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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1222

**CHARLES L. WOLFF, JR., WARDEN
NEBRASKA PENAL AND CORRECTIONAL COMPLEX,**

Petitioner,

vs.

DAVID L. RICE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICUS CURIAE

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES i

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENTS:

I.

This Court Should Support The Right Of Privacy And Uphold Judicial Integrity By Affirming The Decision Of The Court Of Appeals 4

II.

Allowing Additional Facts To Be Presented At A Suppression Hearing To Validate The Original Affidavit For A Search Warrant Is Contrary To The Express Language Of The Fourth Amendment And Contrary To The Purpose For The Warrant Requirement 15

III.

This Court Should Not Inhibit The Enforcement Of Fourth Amendment Rights By Limiting The Relief Presently Available Under 28 U.S.C. §2254 .. 20

CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Agnello v. United States, 269 U.S. 20 (1925) 18

Beck v. Ohio, 379 U.S. 89 (1964) 14, 18

Boyd v. United States, 116 U.S. 616 (1886) 6, 7, 12, 17, 21

Bramlett v. Peterson, 307 F.Supp. 1311 (M.D. Fla. 1969) 23

Camara v. Municipal Court, 387 U.S. 523 (1967) 17

Chimel v. California, 395 U.S. 752 (1969) 17

Coolidge v. New Hampshire, 403 U.S. 443 (1971) 17, 18

Entick v. Carrington, 19 Howell's State Trials 1029 (1765) 5

Henry v. United States, 361 U.S. 98, 102 (1959) 14

Johnson v. United States, 338 U.S. 10 (1948) 17, 18

Jones v. United States, 357 U.S. 498 (1958) 18

Katz v. United States, 389 U.S. 347 (1967) 17, 18

Lefkowitz v. Newsome, 420 U.S. 283 (1975) 20

Mancusi v. DeForte, 392 U.S. 364 (1968) 16

Mapp v. Ohio, 367 U.S. 643 (1961) 8, 13

McDonald v. United States, 335 U.S. 451 (1948) 17

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) 17, 20

Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) 16

Stanford v. Texas, 379 U.S. 476 (1965) 5

Steadman v. Duff, 302 F.Supp. 313 (M.D. Fla. 1969) 22

Terry v. Ohio, 392 U.S. 1 (1967) 9

United States v. United States District Court, 407 U.S. 297 (1972) 16, 19

Vale v. Louisiana, 399 U.S. 30 (1970) 18

Weeks v. United States, 232 U.S. 383 (1914) 7

Whiteley v. Warden, 401 U.S. 560 (1971) 17

Wolf v. Colorado, 338 U.S. 25 (1949) 12, 17

Wolff v. Rice, 513 F.2d 1280, 8 Circuit (1975) 10

Texts and Articles

1 Cooley, Constitutional Limitations, 610-15 (1927) 5, 6

Kaplan, Search and Seizure: A No Man's Land in Criminal Law, 49 California Law Review 474 (1961) 5

Schrock and Welsh, Up from Calandra; The Exclusionary Rule as a Constitutional Requirement, 59 Minnesota Law Review 251 (258) (1974) 10

Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. of Ch. L.R. 665 (1970) 13

Traynor, Mapp v. Ohio at Large in the Fifty States, 1962 Duke L. Journal 319, 322, 325 (1962) 11, 12

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INTEREST OF THE AMICUS CURIAE

The National Legal Aid and Defender Association (NLADA) is a not-for-profit organization whose primary purpose is to assist in providing effective legal services for the poor. Its members include the great majority of

defender offices, coordinated assigned counsel systems, and legal aid societies in the United States. In addition, 4,000 individual members, most of whom are private practitioners, are numbered among the ranks.

NLADA's concern with equal justice for the poor has caused it to be in the forefront of those whose concern is the preservation of our civil liberties and the fundamental freedoms guaranteed by the Bill of Rights. The exclusionary rule is an essential ingredient of those rights guaranteed by the Constitution. Any attempt to weaken it or modify it would shake the foundations of the criminal law as now constituted and further complicate judicial administration. Confessions, eye-witness identifications, the right of privacy, as well as the right of citizens to be secure in their homes would all be threatened by the abolition or modification of this important tool. Poor people would be victimized without recourse and without effective deterrent. Therefore, NLADA supports the position of the Eighth Circuit Court of Appeals in filing this Amicus Brief. NLADA has received the consent of both parties for the filing of this brief.

SUMMARY OF ARGUMENT

The Fourth Amendment to our Constitution was created to protect the privacy of citizens from government intrusion. This court announced an exclusionary rule of evidence in an effort to give meaning to the Fourth Amendment and to preserve judicial integrity. The petitioners have criticized the exclusionary rule but have not shown any alternative which has proven to be effective. Petitioners suggested modification of the exclusionary rule would add further confusion to the law

of search and seizure and would place the protections guaranteed by the Fourth Amendment in the discretion of the police.

To permit the State to supplement a faulty affidavit for search warrant at a subsequent proceeding is contrary to the clear, express language of the Fourth Amendment. Such an after-the-fact showing of probable cause is inconsistent with the purpose of the warrant clause of the Fourth Amendment—to protect the right of privacy by placing a judicial officer between the police and the individual. This purpose can only be satisfied by a prior determination of probable cause.

The holdings, reasoning and principles of this Court, for decades, establishes that only a prior determination of probable cause can satisfy the warrant clause of the Fourth Amendment.

The Decisions of this Court provide that a person who asserts that a violation of his 4th Amendment rights led to his conviction in a state court may seek the protection of those rights in a Federal District Court pursuant to the provisions of 28 U.S.C. § 2254 and that a claim of innocence is not a condition precedent to an application for such relief.

Amicus prays that this Court will reject petitioners request for a departure from the law as it now exists.

ARGUMENT

I.

THIS COURT SHOULD SUPPORT THE RIGHT OF PRIVACY AND UPHOLD JUDICIAL INTEGRITY BY AFFIRMING THE DECISION OF THE COURT OF APPEALS.

The Fourth Amendment to the United States Constitution was fashioned to protect the privacy of the citizens from government intrusion. In an effort to give meaning to the Fourth Amendment and to preserve judicial integrity, this Court announced the exclusionary rule of evidence. This Court recognized the responsibility of vindicating constitutional interests and not sanctioning unconstitutional behavior. During the 61 years of the exclusionary rule's existence, no workable alternative has been developed which will give meaning to the words of the Fourth Amendment and preserve the integrity of our judicial system. The sanctity of a person's home is a fundamental right and freedom that should not be abridged lightly or at someone's whim.

A.

Historical Development Of The Protection

Search warrants were unknown to the early common law and any unconsented entry onto the land of another was a trespass. First use of the search warrant was confined to cases where the owner of the chattels was willing to swear—with a suit for trespass certain to follow were he mistaken—that property stolen from him was lodged on the land of another.

The use of the search warrant gradually developed to allow search not only for stolen property, but for any

property which the private citizen was not permitted to possess. This included two main types of contraband which were subject to forfeiture to the crown—goods upon which the property tax had not been paid and the means of instrumentalities of a crime. In each of these cases, the property seized might also be used as evidence, but a necessary condition of the seizure was the fact that the citizen was for some reason not entitled to possess the property. (Kaplan, Search and Seizure: A No Man's Land in Criminal Law, 49 California Law Review 474 (1961)).

The search warrant requirements of the federal and state constitutions are historically attributable to opposition in England to "general warrants" and in this country to "writs of assistance", which were used in an attempt to broaden the limited scope of search warrants under the early common law. (*Stanford v. Texas*, 379 U.S. 476 (1965)).

In seventeenth century England, general warrants were authorized by the Court of Star Chamber and the Secretary of State to suppress political criticism of the Crown. Both general search warrants and general arrest warrants were issued against the authors, printers and publishers of alleged politically libelous books and pamphlets. These warrants were in effect a carte blanche for the arrest of anyone and the search of anything. No person was named in the warrants, no place was described and no evidence of connection with the crime was required for issuance. Only the executing officer's discretion limited the application of the warrants. (1 Cooley, Constitutional Limitations 610-15 (1927)).

The abuse wrought under these warrants were put to an end by Lord Camden's famous opinion in *Entick v.*

Carrington (19 Howell's State Trials 1029 (1765)) portions of this opinion were liberally quoted in *Boyd v. United States*, 116 U.S. 616 (1886).

The abuse became so great that in 1766 the British House of Commons passed resolutions condemning general warrants for the seizure of persons or papers, but the protection of such parliamentary action did not filter down to the colonies. Instead, our colonial forebearers suffered from unlimited searches and seizures through the unrestrained use of general search warrants. These writs were issued to revenue officers to search for smuggled goods; the only limitations of the writ was the executing officer's discretion.

The illegality of the issuance of general writs of assistance, and the danger to the people resulting from their use by government, was pointed out by James Otis in his memorable address before the Superior Court in Boston in 1761. James Otis declared the writs to be "the worst instrument of arbitrary power, the most destructive of English liberty and fundamental principles of law, that ever was found in an English law book; since they placed 'the liberty of every man in the hands of every petty officer'." (1 Cooley, Constitutional Limitations, supra).

The proposed Constitution for the United States of America which came from the hands of the members of the Constitutional Convention in 1787 did not include a Bill of Rights. To allay the fears of those who held the view that a Bill of Rights was essential to any document creating a national government, the supporters agreed to propose amendments incorporating these provisions in the first session of the new Congress. Without this promise, it's unlikely that the Constitution would have been ratified.

The Fourth Amendment was adopted to protect the individual from the power of government. Being a part of the constitution protected the amendment from legislative change due to popular whim.

In 1886, this Court in *Boyd v. United States*, 116 U.S. 616, held that the Fourth Amendment created a pervasive constitutional right against governmental intrusion into the privacy of the individual. The court recognized the constitutional right of an individual to preserve the sanctity of his home and the privacies of life from intrusion by the government and its employees.

Later in 1914, this Court in *Weeks v. United States*, 232 U.S. 383 established a Federal Exclusionary Rule regarding evidence seized in violation of the Fourth Amendment. In that case, federal marshals conducted warrantless searches of the defendant's house and obtained various papers which they later used, over his objection, as evidence at his trial. This court noted that:

> "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment, declaring his right to be secure against such searches and seizures, is of no value and so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering in the fundamental law of the land." (393)

Stressing the importance of judicial integrity, Mr. Justice Day further stated:

> "To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not open defiance of the protection of the people against such unauthorized action." (394)

The decision in *Weeks* applied only to federal cases.

In *Mapp v. Ohio*, 367 U.S. 643 (1961), the Exclusionary Rule which had previously been applied only in federal cases was held to be an essential part of due process and was thus applied to the States. Moreover, Mr. Justice Clark, speaking for the majority in *Mapp*, emphasized the importance of judicial integrity, stating:

> "Our decision, founded on reason and truth, gives to the individual no more than the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled and to the courts, that judicial integrity so necessary in the true administration of justice." (660)

B.

The Importance Of Preserving Judicial Integrity

One of the primary reasons this Court established the Exclusionary Rule was to preserve judicial integrity. In an era in which disrespect for legal process is increasingly manifested, it is important that judicial institutions reaffirm their commitment to judicial integrity. If the courts themselves will not affirm the integrity of the judicial process in an area which they exercise control, they cannot expect the public at large to have respect for law. In order to promote confidence in the administration of justice, this Court has decided government officials must obey the law in the same manner that other citizens are required to do so. The Fourth Amendment was intended to protect citizens from the government and places specific restrictions on the judiciaries power to issue search warrants. The Amendment is a limitation on the entire criminal justice system and imposes restraint upon courts, police and prosecutors alike.

Commenting upon the concept of judicial integrity in *Terry v. Ohio*, (392 U.S. 1 (1967) at 13), the Court stated:

> "Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. Thus in our system evidentiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by state agents. A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur."

It is not only the integrity of the courts to which this problem is addressed, but also the integrity of the Constitution which protects each individual in our society and is the fabric which holds our society together.

The instant case presents an excellent example of this court's duty to preserve judicial integrity. This case involves the issuance of an illegal search warrant by a member of the judiciary. The petitioners focus their attention on the actions of the police officers and by so doing ignore the need to review the actions of the judge. The Fourth Amendment was incorporated into the constitution to protect individual citizens from all members of the government. For the court to act as if it is detached from the prosecution of an alleged criminal violator, it must ignore the manner in which citizens view it. A citizen wants protection from the violations of constitutional rights by members of the executive, judicial and legislative branches of government.

In the instant case, a magistrate commanded certain police officers to go into Respondent's home to look for evidence (Petitioners' Appendix p. 9, 10). The action by the judge was clearly illegal (*Wolff v. Rice*, 513 F. 2d 1280). The same judge who issued the illegal warrant decided that probable cause existed for the continued prosecution. At the trial of the instant case, a brother judge admitted the illegally seized evidence and subsequently sentenced the defendant to life imprisonment.

> "The trial is part of the whole prosecution just as the court is a part of the whole government that is investigating, charging, judging and sentencing the individual." Schrock and Welsh, Up From Calandra: The Exclusionary Rule as a Constitutional Requirement, 59 Minnesota Law Review 251 (258) (1974).

The trial is part of the whole prosecution of an individual citizen by the government. The courts cannot disavow responsibility for the manner in which evidence is obtained when they affirmatively sanction the illegal behavior by admitting the evidence or in this case where the courts command that the evidence be seized. *Amicus* requests that this court reject the request of the petitioners and refuse to affirmatively sanction the unconstitutional behavior present in the case at bar.

C.

Attacks On The Exclusionary Rule

The petitioners attack the exclusionary rule by addressing themselves to the rule's deterrence function and ignoring the need to preserve judicial integrity. In response to these arguments, *amicus* must disagree with certain basic assumptions inherent in petitioner's philosophy. Amicus contends:

1) Crime is not caused by the Bill of Rights.
2) Crowded court calendars are not the product of the 4th Amendment.
3) All citizens who are charged with a crime and benefit from the exclusionary rule are not guilty of the crime charged.
4) Police are not punished by the court's refusal to sanction illegal seizures of evidence.

Throughout the discussion of the problem, the tendency for those who are critical of the rule is to speak in terms of the "honest" citizens as opposed to the "criminals" or the "guilty". As one commentator has noted,

> "It is seriously misleading, however, to suggest that wholesale release of the guilty is a consequence of the exclusionary rule. It is a large assumption that the police have invariably exhausted the possibilities of obtaining evidence legally when they have relied upon illegally obtained evidence. It is more rational to assume the opposite when the offer of illegally obtained evidence becomes routine." Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 Duke L. Journal, 319, 322 (1962).

This kind of dichotomy between the "honest" citizen and the "criminal" can only lead to emotional responses rather than rational ones. It should not be forgotten that it is the person with unpopular views, for example, who tests the constitutional right to free speech; it is the person who is prosecuted for the violation of some offense who tests the validity of the words that proclaim procedural due process in our society. As long as the discussion emphasizes that "honest, upright citizens" are on the one side and the law violator on the other, the only conclusion that can be arrived at is that these rights that protect the outcasts and unpopular within our society should be eliminated.

> "The understandably impatient lawabiders, who approve official retribution without restraint against wrongdoers, do not visualize themselves as the objects of oppressive government action in any near future. Not for them are the warnings of history." Traynor, *Mapp v. Ohio At Large in the Fifty States*, 1962 Duke L. Journal 319 at 325 (1962).

It is only a short step to the abolition of all our rights under the Bill of Rights if constitutional problems are placed in this framework since the only persons who directly test the protections are the pariahs of our society. Such a danger was recognized by this Court in *Boyd v. U.S.*, 116 U.S. 616, 635 (1886).

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedures." Id. at 635.

It should be remembered that this court did not move hastily in imposing the exclusionary rule on the States. It waited 12 years after its decision in *Wolf v. Colorado*, 338 U.S. 25 (1949). This Court in *Wolf* wanted the States to act as "laboratories" to experiment with alternative remedies to the exclusionary rule. During these years when this court held back, such alternative "remedies" to the exclusionary rule as internal police discipline procedures, prosecution of police and private tort actions proved utterly worthless. Actually, those States that wished to have an effective remedy against illegal search and seizure practices by the police chose the exclusionary rule. By 1956, 23 States had abandoned other methods of enforcing search and seizure protections in favor of the exclusionary rule in the hope of shaping police conduct to conform to constitutional standards. (See Annot. 50 A.L.R. 2d 531, 556 et seq. (1956)).

This court found in *Mapp v. Ohio*, 367 U.S. 643 (1961) that in those states which did not provide such a remedy, constitutional search and seizure protections were nothing more than an empty promise. Now, a little over 14 years after *Mapp*, it is claimed that the exclusionary rule has not worked. There is no empirical data to establish this. Such proof is not found in Professor Oak's article, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. of Ch. L.R. 665 (1970). Indeed, although Professor Oaks questions the value of the exclusionary rule, he concedes that there is no statistical data available challenging its effectiveness. Actually, there is no way to be certain what precise effect the exclusionary rule has had on police conduct without an extensive examination of at least a representative sample of police actions in connection with particular searches, seizures and arrests. This is so because no notoriety attends *legal* police conduct, and both incidents and the motivation for it go unrecorded. It is probable that very marked, but unmeasured, improvements in police procedures have taken place. For example, there has not come to the attention of the courts since the *Mapp* decision, any cases revealing such outlandish police practices as took place in California in the *Irvine* and *Cahan* cases. Indeed, if it is assumed that police intend to be both rational and lawful, then the exclusionary rule must have contributed to more lawful actions by the police, augmented the professionalism of law enforcement officers, and improved the integrity of the judicial process by leeching from it at least some illegally acquired evidence. Furthermore, the overwhelming percentage of pleas and convictions which attend charges provides ample proof that the rule has not stultified either police work or the judicial process. At the same time, there is no demonstrated connection

between increases in crime rates and the rule. To conclude otherwise requires generalizations about cause and effect in crime rates which are unwarranted without vastly more data and analysis than is now available.

The petitioners suggest that this court modify the application of the exclusionary rule before any effective alternatives have been shown to exist or that the need for the protection has diminished. Moreover, they fail to show that any state has demonstrated an effective alternative to the exclusionary rule.

With such inconclusive and inconsistent data at hand, certainly judicial conservatism would dictate that the Exclusionary Rule should not be eliminated or narrowed without more substantial corroboration.

The suggestion that this court create a new interpretation of the exclusionary rule which would except good faith violations from its purview would create a whole new body of law, involve the courts in inquiring into the motivations of individual police officers, create new incentives for police officers to lie and further confuse the law of search and seizure.

In *Beck v. Ohio*, 379 U.S. 89, (1964), Mr. Justice Stewart addressed himself to the "good faith" of the police officers. He stated,

> "We may assume that the officers acted in good faith in arresting the petitioner. But 'good faith' on the part of the arresting officers is not enough." *Henry v. United States*, 361 U.S. 98, 102. "If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers and effects', only in the discretion of the police." (97)

The practical effect of such a change would protect search warrants from review by the courts since defense lawyers would not litigate the illegality of the search warrant if their success would provide no relief for their client. This would not enhance further professionalization of the judicial profession and would frustrate this court's attempt to protect the constitutional rights of citizens.

Although the petitioners have criticized the exclusionary rule, they have failed to illustrate a successful alternative. *Amicus* requests that this court uphold the right to privacy guaranteed in the Fourth Amendment and judicial integrity by refusing to sanction the unconstitutional behavior in the instant case.

II.

ALLOWING ADDITIONAL FACTS TO BE PRESENTED AT A SUPPRESSION HEARING TO VALIDATE THE ORIGINAL AFFIDAVIT FOR A SEARCH WARRANT IS CONTRARY TO THE EXPRESS LANGUAGE OF THE FOURTH AMENDMENT AND CONTRARY TO THE PURPOSE FOR THE WARRANT REQUIREMENT.

The petitioners' argument that additional facts should be permitted at a subsequent proceeding to validate a prior affidavit for search warrant is specifically contrary to the express prohibition in the Fourth Amendment that "no warrant shall issue, but upon probable cause . . ."

Whatever may be shown at a subsequent proceeding, the unrebuttable fact remains that a search warrant was *issued* without probable cause. Consequently, for petitioners' argument to succeed, it is necessary to ignore the specific express prohibition of the Fourth

Amendment and conclude that even though a search warrant was issued without a showing of probable cause, the search can be upheld due to the existence of probable cause which was not presented to obtain the warrant. Such an argument finds no support in the opinions of this Court, but rather has been consistently rejected.

In *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, (1920), Mr. Justice Holmes pointed out that the fact that the results of the search and seizure might have been achieved in a constitutional manner, rather than the unconstitutional manner actually used, is, in effect, irrelevant. (251 U.S. at 392; see also, *Mancusi v. DeForte*, 392 U.S. 364 (1968)). Mr. Justice Holmes also noted that to permit the government to use the knowledge gained "by doing the forbidden act" would reduce "the 4th Amendment to a form of words". (251 U.S. at 392) Surely the Fourth Amendment is not merely a "form of words" without substance. In fact, Mr. Justice Powell has recently observed that "the warrant clause of the Fourth Amendment is not dead language . . . Rather, it has been 'a valued part of our constitutional law for decades'." *United States v. United States District Court*, 407 U.S. 297, 315 (1972).

To uphold a search made pursuant to warrant issued without probable cause is to render the warrant clause of the Fourth Amendment, that "*no* warrants shall *issue*, but upon probable cause," "dead language" or a mere "form of words".

The need for a determination that probable cause exists for a search prior to the issuance of a search warrant can be seen from the history and purpose of the warrant requirement. The Fourth Amendment developed from the reaction to the "general warrants

and warrantless searches that had so alienated the colonists", *Chimel v. California*, 395 U.S. 752, 761 (1969), and sought to protect each individual from the "invasion of his indefeasible right of personal security, personal liberty and private property." (*Boyd v. United States*, 116 U.S. 616, 630 (1886). In order to prevent arbitrary invasions upon the right of privacy, "which is at the core of the Fourth Amendment", *Wolf v. Colorado*, 338 U.S. 25, 27 (1949), the Fourth Amendment places a judicial officer between the police and the individual.

> "When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement officer." *Johnson v. United States*, 333 U.S. 10, 14 (1948). See also, *McDonald v. United States*, 335 U.S. 451, 453 (1948); *Coolidge v. New Hampshire*, 403 U.S. 443, 449-50 (1971).

Consequently, to enforce or give meaning to the purpose of the Fourth Amendment it is necessary for a neutral judicial officer to find probable cause *prior* to the authorization for search; a finding of probable cause subsequent to the authorization for search totally fails to allow the judicial officer to play the vital role required by the Fourth Amendment. Thus, this Court has consistently held that a search without a *valid* search warrant, issued by a judicial officer *after* being supplied "with sufficient information to support an independent judgment that probable cause exists for the warrant" (*Whiteley v. Warden*, 401 U.S. 560, 564 (1971), and cases cited therein), is *per se* unreasonable, *Katz v. United States*, 389 U.S. 347, 357 n. 18 (1967); *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967); *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973)), except in a few specific, limited and exigent situations (*Katz v. United States*, 389 U.S. 347, 357 n. 19 (1967); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

The requirement of a search warrant has been applied to fulfill the purpose of the Fourth Amendment regardless of whether or not probable cause may have existed beyond the legal process. In *Agnello v. United States*, 269 U.S. 20 (1925), in a unanimous opinion delivered by Mr. Justice Butler, this Court decided that:

> "Belief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause." 269 U.S. at 33.

The foregoing principle is now well settled, having been applied by this Court for decades to the present time. *Johnson v. United States*, 333 U.S. at 14 n. 4, *Jones v. United States*, 357 U.S. 493, 497-98 (1958); *Vale v. Louisiana*, 399 U.S. 30, 34 (1970); *Coolidge v. New Hampshire*, 403 U.S. 443, 450-51 (1971).

The argument for "after-the-event" justification for a search has been advanced to this Court previously and has been soundly rejected. In *Katz v. United States*, 389 U.S. 347 (1967), it was stated:

> "It (Government) argues that surveillance of a telephone booth should be exempted from the usual requirement of advance authorization by a magistrate upon a showing of probable cause. We cannot agree. Omission of such authorization 'bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the . . . search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment.' *Beck v. Ohio*, 379 U.S. 89, 96" 389 U.S. at 358.

Likewise, in *United States v. United States District Court*, 407 U.S. 297 (1972) where the Government argued the validity of executive approved surveillance without prior judicial approval, this Court stated:

> "The Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised . . . The independent check upon executive discretion is not satisfied, as the Government argued, by 'extremely limited' post-surveillance judicial review. Indeed, post-surveillance review would never reach the surveillances which failed to result in prosecutions. Prior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights". 407 U.S. at 317-18.

The petitioners by arguing that additional facts should be allowed to bolster or validate a prior insufficient affidavit for search warrant are, in effect, asking this Court to overrule decades of decisions, reasoning and sound principles. Additionally, petitioners seemingly ignore the purpose and history of the warrant requirement. If the judicial officer who issues the search warrant need not be given information which constitutes probable cause, his function becomes drastically less than that envisioned in the Fourth Amendment, and it is questionable if such a judicial officer can effectively comply with the "further requirement of probable cause (which) instructs the magistrate that baseless searches shall not proceed". *United States v. United States District Court*, 407 U.S. at 316.

III.

THIS COURT SHOULD NOT INHIBIT THE ENFORCEMENT OF FOURTH AMENDMENT RIGHTS BY LIMITING THE RELIEF PRESENTLY AVAILABLE UNDER 28 U.S.C. § 2254

This Court has recently held, in *Lefkowitz v. Newsome*, 420 U.S. 283, (1975), that a defendant pleading guilty in a state court was not foreclosed from pursuing a claim of the violation of his Fourth Amendment rights in a federal habeas corpus proceedings, if state law permitted a review of such constitutional issues after a plea.

That decision notwithstanding this petitioner continues to argue that the doors to the Federal Court should be closed to those habeas corpus petitioners who assert the denial of fourth amendment rights but do not assert their innocence. A claim of innocence, however, has never been an essential allegation in the petition for the writ. Habeas corpus has been available, as an example, to question the sufficiency of an indictment even after petitioner's conviction.

Justice Powell, in his dissenting opinion in *Schneckloth v. Bustamonte*, 412 U.S. 218, (1973), cited by petitioner in this case said, "I am aware that history reveals no exact tie of the writ of habeas corpus to a constitutional claim relating to innocence or guilt."

The respondent in this case plead not guilty and has continuously asserted his innocence throughout the appeals in the Nebraska State Courts and in the U.S. District Court, the U.S. Court of Appeals and in this Court.

Petitioner seems further to suggest that fourth amendment rights somehow do not rise to the dignity of other rights secured by the Bill of Rights. The claim would

appear to be that since the defendant has been convicted, the violation of his right to be protected against unreasonable searches and seizures amounts to little more than a minor annoyance to the defendant which does not impugn the integrity of the fact finding process and which is not worthy of the attention of the Federal Courts.

Amicus has earlier argued that an important part of the fact finding process is the integrity of the forum in which the matter is heard. The element of judicial integrity in the fact finding process was one of the paramount reasons for fashioning of the exclusionary rule.

The historical and constitutional significance of fourth amendment rights was explained by this Court in *Boyd v. U.S.*, 116 U.S. 616, (1886), in which Justice Bradley said:

> "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions, on the part of the Government and its employees, of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense; it is the invasion of this sacred right which underlies and constitutes the essence of *Lord* Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the

> condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other." (630)

Petitioners apparently believe that state courts are always willing to adequately protect a defendant's federal constitutional rights and that resort to the Federal Courts is a disservice to the principles of federalism and causes friction between State and Federal Courts. Were it not for these interminable petitions, the argument runs, we would more effectively utilize federal judicial resources, achieve finality in criminal cases and reduce federal state friction, through the proper observance of the principles of federalism.

Petitioners' belief that the state courts are willing to adequately protect a defendant's federal constitutional rights would appear to have little support in light of the decisions of Federal Courts protecting the Constitutional rights of persons whose claims were denied in State Courts.

Two of the numerous cases of this type involve habeas corpus petitioners who had been denied the assistance of counsel in misdemeanor prosecutions in the Florida State Courts long after the U.S. Court of Appeals for the Fifth Circuit had required such assistance.

In *Steadman v. Duff*, 302 F. Supp. 313 (M.D. Fla. 1969), the District Court granted defendant relief and referring to certain arguments made in this case by petitioner, said,

> "Comity must operate both ways, and the Florida courts have consistently refused to recognize the repeated federal mandates of the Fifth Circuit. Here the traditional presumption that state courts will protect constitutional rights in good faith has been overcome. Indeed, this Court vacated eight

misdemeanor convictions rendered by the Justice of the Peace Courts of Volusia County for failure to offer indigent misdemeanants court-appointed counsel nearly two years ago in Cloer v. Thursby, No. 67-618-Civ-J (M.D. Fla., filed Nov. 29, 1967).

The time-honored principle of federalism cannot be made a shield to protect state courts reluctant to accept federal decisions. Inherent in the original concept of federalism was not only the idea of pluralism of state and federal governments, but also the principle that the federal courts would operate as a check on the states to preserve constitutionally guaranteed rights. *See* Note, Theories of Federalism and Civil Rights, 75 Yale L.J. 1007, 1015, 1029-32 (1966).

It is settled that if resort to state remedies would be futile because state courts have conclusively ruled against petitioner's position, a federal court may hear and decide a petition for habeas corpus without requiring exhaustion of state remedies." (316)

In *Bramlett v. Peterson*, 307 F. Supp. 1311 (M.D. Fla. 1969), the Court granted injunctive and Habeas Corpus relief and said,

> The abstention doctrine is not applicable here, for its purpose is to permit state courts to have a first opportunity to resolve new issues of constitutional law or questions in which federal and state law are intertwined. *See* Comment, 68 Colum.L.Rev. 1201, 1205-06 (1968). As set out above, however, the issue of counsel for accused indigent misdemeanants is neither new nor complex.
>
> If the purpose of the abstention doctrine is simply to permit state courts an opportunity to hear a given question that otherwise would be preempted to federal courts, that purpose is met by the Boyer v. City of Orlando case, *supra*, argued before the Florida Supreme Court on November 12, 1969.

> Moreover, Florida courts have consistently heretofore refused to recognize Fifth Circuit Court of Appeals mandates. Steadman v. Duff, 302 F. Supp. 313, 315 (M.D. Fla., 1969). Although we will not assume that the Florida Supreme Court will ignore further the many precedents that have accumulated, neither will we wait for the *Boyer* result." (1321)

Since the Federal Courts are the final arbiter of federal constitutional questions and since state courts do not always adequately protect a defendant's constitutional rights the problems which petitioner raises with regard to federal-state friction seem likely to continue.

If there is a strain put upon the limited federal judicial resources caused by the filing of habeas corpus petitions raising fourth amendment issues, as petitioner claims but does not demonstrate, it would appear that the answer might be to seek to increase the amounts of money allocated to the federal judiciary or to institute administrative procedures which would relieve the strain. The answer is not to bar the door of the Federal Court to petitioners seeking the vindication of their federal constitutional rights.

These rights secured by the fourth amendment are of the very essence of constitutional liberty and neither the habeas corpus act nor the decisions of this Court require that the protection of the federal courts be limited to those who claim innocence.

Amicus respectfully prays that this Court will reject petitioners' request for such a radical departure from the letter and spirit of the law as it now exists.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that this Court affirm the judgment of the Eighth Circuit Court of Appeals below.

Respectfully submitted,

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